Appendix A

District Court Opinion

United States District Court
for the Northern District of California

Filed May 23 1967
Clerk, U. S. Dist. Court, San Francisco

Baltimore Shippers and Receivers Association, Inc., The Charter Oak Shippers Cooperative Association, Inc., Industrial Shippers Association, Inc., United Shippers Association, Inc., *Plaintiffs,* vs. Public Utilities Commission of the State of California and Peter E. Mitchell, William M. Bennett, A. W. Gatov, William Symons, Jr., and Fred P. Morrissey, *Defendants.*	No. 45076 Civil
Charles J. Worth Drayage Company, Los Angeles Wholesale Institute, *Plaintiffs,* vs. Public Utilities Commission of the State of California, and Peter E. Mitchell, William M. Bennett, A. W. Gatov, William Symons, Jr., and Fred P. Morrissey, *Defendants.*	No. 45123 Civil
G. I. Trucking Company, Redway Truck and Warehouse Company, *Plaintiffs,* vs. Public Utilities Commission of the State of California, and Peter E. Mitchell, William M. Bennett, A. W. Gatov, William Symons, Jr., and Fred P. Morrissey, *Defendants.*	No. 45576 Civil

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ORDER GRANTING PERMANENT INJUNCTION

Before: Hamlin, Circuit Judge, and Burke and Zirpoli, District Judges.

Zirpoli, J.

This is an action brought by two classes of plaintiffs, (1) nonprofit cooperative shippers' associations, and (2) motor carriers who contract with such shippers' associations to deliver their goods from break-bulk points to final destinations, both within the State of California. The action is brought to contest the jurisdiction of defendants to require the carriers to assess charges in accordance with minimum rate tariffs published by the Public Utilities Commission of the State of California for delivery services performed wholly within commercial zones.[1]

The action was instituted in the district court pursuant to the provisions of 28 U.S.C. §1331(a) because it raises federal questions wherein the alleged matter in controversy exceeds the sum or value of $10,000, and the invoking of a three-judge district court was requested under the provisions of 28 U.S.C. §§ 2281 and 2284 because the requested relief includes enjoining a state official from enforcing a state regulatory scheme. Plaintiffs seek a declaratory judgment that defendants lack jurisdiction to regulate rates in this matter, 28 U.S.C. § 2201, and a permanent injunction preventing defendants from enforcing said rates against plaintiff motor carriers.[2]

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1. Defendants claim jurisdiction to regulate the rates in question by virtue of Cal. Pub. Util. Code §§ 3506, 3906, which allow regulation "insofar as such regulation is permitted under the provisions of the Constitution and the acts of the Congress of the United States". Provision for establishment of rates is provided for in Cal. Pub. Util. Code §§ 3661-3670 and 4011-4016, pursuant to which schedules of minimum rates have been established.

2. In view of the fact that defendants have definitely acted to assert jurisdiction over plaintiff motor carriers in such manner

The factual setting of the case is as follows: Baltimore Shippers and Receivers Association, Inc., The Charter Oak Shippers Cooperative Association Inc., Industrial Shippers Association, Inc. and United Shippers Association, Inc.; the plaintiffs in No. 45076 and Los Angeles Wholesale Institute, a plaintiff in No. 45123 are nonprofit shippers cooperative associations incorporated in various states. They exist primarily for the purpose of providing shipping services to members at no profit to the association and at a saving over other means available to the shippers. Freight costs to members are reduced, first, by pooling loads for the most efficient shipping over long haul interstate routes and, second, by centralizing assembly and distribution techniques in the pick-up and delivery of the goods. The result is full shipments over the long haul and direct shipments to assembly points and from break-bulk points. The function of these associations is well established and recognized.[3]

Charles Worth Drayage Co., G. I. Trucking Company, and Redway Truck and Warehouse Company are plaintiffs

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as will affect plaintiff nonprofit shippers' associations and have threatened the imposition of sanctions against the motor carriers, the case is clearly "ripe for determination" within the requirements of the Declaratory Judgment Act. See *Public Service Comm. v. Wycoff Co.*, 344 U.S. 237 (1952); *Railroad Transfer Service Inc. v. Chicago*, ... U.S. ....., 35 U.S.L. Week 4306 (decided March 27, 1967).

3. The existence and function of nonprofit shippers associations has long been recognized. The provisions of the Freight Forwarder Act exempting nonprofit shippers associations from regulations, 49 U.S.C. § 1002(c)(1), went into effect in 1942. 56 Stat. 284. The stipulated facts show that the plaintiff shippers associations in this case have been shipping into California beginning as early as 1938 (Los Angeles Wholesale Institute) and beginning as late as 1960 (Charter Oak Shippers Cooperative Association, Inc.), with most of them beginning operation in California between 1954 and 1959. (Joint Pre-trial Order pp. 15-16.)

in Nos. 45123 and 45576. They are motor carriers holding certificates of public convenience from defendant Public Utilities Commission of the State of California and are authorized to operate in specified areas within the State of California. Charles Worth Drayage Company operates in an area which roughly corresponds to the San Francisco commercial zone. G. I. Trucking Company is authorized to carry specified cargoes within an area which includes Los Angeles, San Diego and such points as Lompoc, thus embracing an area larger than the Los Angeles commercial zone. Redway Truck and Warehouse Company operates within the Los Angeles basin and additionally provides storage facilities within that area, which is somewhat larger than the Los Angeles commercial zone.

The parties have stipulated that the entire movement involved here is in interstate commerce, thus the only issue before the court is the propriety of the defendants' attempts to impose a schedule of minimum rates to be charged by the motor carriers to the nonprofit shippers' associations for deliveries made within the commercial zones.

The statutory scheme of regulation under the Interstate Commerce Act involves Part II of the Act, known as the Motor Carrier Act, 49 U.S.C. §§ 301-327 and Part IV of the Act, known as the Freight Forwarders' Act, 49 U.S.C. §§ 1001-1022.

The first relevant section is 49 U.S.C. § 303(b)(8), which is part of the section listing exemptions from the comprehensive scheme of regulation of the Motor Carrier Act. The effect of the section is to exempt motor carrier transportation within commercial zones from regulation, with the exception of those provisions which relate to qualifications and maximum hours of service of employees and safety of operation or standards of equipment, until such time as the

Commission finds that the national transportation policy makes it necessary to regulate these areas. This section provides:

49 U.S.C § 303(b)

> . . . nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, . . .

The second relevant section is 49 U.S.C. § 1002(c)(1), which is part of the section listing exemptions from the regulatory scheme of the Freight Forwarders' Act. The section exempts nonprofits shippers' associations from the regulation and registration requirements which apply to freight forwarders. This section provides:

49 U.S.C. § 1002(c)

> (c) The provisions of this chapter shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, ...

Freight forwarders and nonprofit shippers' associations perform nearly identical functions, except for the fact that the freight forwarders hold themselves out to do business with the public, rather than providing services only for

members of an association, and they operate at a profit rather than as a nonprofit service to members. Each handles the consolidation, shipment and distribution of goods, attempting to take advantage of bulk rates and the maximum efficiencies in assembly, distribution and routing techniques.

The last major relevant section is 49 U.S.C. § 1008, which is part of the Freight Forwarder Act allowing common carriers to file tariffs when serving freight forwarders and others similarly situated in assembling and distributing their goods. The section provides:

49 U.S.C § 1008

> Nothing in this Act shall be construed to make it unlawful for common carriers subject to chapters 1, 8, or 12 of this title to establish and maintain assembling rates or charges and/or distribution rates or charges, and classifications, rules, and regulations with respect thereto, applicable to freight forwarders and others who employ or utilize the instrumentalities or services of such common carriers under like conditions, which differ from other rates or charges, classifications, rules, or regulations which contemporaneously apply with respect to the employment or utilization of the same instrumentalities or services, if such difference is justified by a difference in the respective conditions under which such instrumentalities or services are employed or utilized. For the purposes of this section (1) the term "assembling rates or charges" means rates or charges for the transportation of less-than-carload or less-than-truckload shipments into a point for further movement beyond as part of a carload or truckload shipment, and (2) the term "distribution rates or charges" means rates or charges for the transportation of less-than-carload or less-than-truckload shipments moving from a point into which such shipments have moved as a part of a carload or truckload shipment. The provisions of this section shall not be construed to authorize the establishment of assembling

rates or charges or distribution rates or charges covering the line haul transportation between the principal concentration point and the principal break-bulk point.

Historically, it appears that motor carriers at one time performed delivery services from break-bulk points to final destinations entirely within commercial zones without regulation by the California Public Utilities Commission. The Public Utilities Commission then ordered the motor carriers to comply with its minimum prescribed rates, which one or more, if not all, of them did for a period of time. Subsequently, the motor carriers, acting pursuant to 49 U.S.C. § 1008, filed tariffs with the I.C.C. establishing rates generally lower than those minimums prescribed by the Public Utilities Commission, and from that time they have continued to charge in accordance with the tariffs filed with the I.C.C. and have refused to comply with the orders of the Public Utilities Commission, despite the threat of impositions of sanctions, including fines and suspension of operating permits.

THE LEGAL ISSUES.

Plaintiffs contend that defendants are precluded from regulating the rates charged by plaintiff motor carriers to plaintiff nonprofit shippers' associations because (1) Congress has pre-empted the field by virtue of the comprehensive regulatory scheme of the Interstate Commerce Act, (2) the minimum rates established by defendants for deliveries within commercial zones are higher than the assembly and distribution tariffs negotiated between the nonprofit shippers' associations and the motor carriers and constitute an unlawful burden on interstate commerce in violation of Article I, Sect. 8 of the United States Constitution, (3) the defendants' tariffs would amount to a taking

of property without due process of law and would violate the equal protection clause of the United States Constitution, and (4) tariffs filed with the Interstate Commerce Commission are valid and in effect within the commercial zones in question, thus precluding regulation by defendants.

Defendants concede that the issues are as stated by plaintiffs, but contend that rather than pre-empting the field, Congress has specifically left regulation in the commercial zones to the states, and even if this is not so, state regulation is necessary to fill the gap formed by the commercial zone exemption. They further contend that there is a valid state interest in a uniform regulatory system, that the prescribed state system does not unreasonably burden interstate commerce, nor violate the due process or equal protection clauses of the United States Constitution, and that the tariffs filed with the I.C.C. are not applicable within commercial zones.

In view of the disposition made by the Court in this matter, it will only be necessary to consider the pre-emption issue and the burden on interstate commerce issue; accordingly, arguments made with respect to the other issues will be relevant only insofar as they relate also to the two issues to be discussed.

THE PRE-EMPTION QUESTION

The merits of pre-emption under the Supremacy Clause, U.S. Const. Art. VI, Par. 2, turn upon an analysis of what is being regulated, by whom, for what purpose, and the statutory language and congressional intent. In this instance, the question involves the regulation of rates by the Public Utilities Commission of the State of California in the interest of maintaining a uniform regulatory system with no "unregulated gaps". The nature of the regulation in-

volved here raises serious questions, for it is economic regulation of interstate commerce in an area which is not, practically speaking, capable of concurrent administration by both the state and federal governments. The famed *Shreveport Rate Case, Houston & Texas Railway Co. v. United States*, 234 U.S. 342 (1913), indicates that this is an area in which there is a significant federal interest and in which the states must tread lightly.

Turning to the question of statutory construction and congressional intent, it becomes apparent that the Interstate Commerce Act has pre-empted the field. Both plaintiffs and defendants argue that the congressional intent as manifested in the legislative history of the statutes favor their respective viewpoints. The court finds that the legislative history is inconclusive.[4] The first and principal statute involved here is 49 U.S.C. § 303(b)(8). This section unambiguously exempts transportation wholly within commer-

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4. With respect to 49 U.S.C. § 303(b)(8), Senator Wheeler, who introduced the bill, appears to have envisioned state regulations when he explained its provisions as follows:

> Furthermore, an exemption is made, unless the Interstate Commerce Commission finds that the law cannot be made to work without its inclusion to some extent, of the transportation of property locally or between contiguous municipalities or commercial zones, as between New York and New Jersey, and also, for instance, as between Washington and Alexandria, and other contiguous cities where the transportation is regulated by the local governments themselves. 79 Cong. Rec. Part 5, p. 5650.

On the other hand, the House debates indicate that a state could not regulate any interstate commerce. It was stated during the debates:

> In the case of *Buck v. Kuykendall*, (267 U.S. 307) the court held that a State could not regulate motor carriers operating in interstate commerce, and that the matter of control of carriers in interstate commerce was entirely in the hands of Congress to provide for Federal regulation.
>
> This decision left the door wide open. . . . 79 Cong. Rec. Part II, p. 12206.

cial zones from regulation, but does not specifically spell out whether or not state regulation is envisioned or permitted. Some aid in interpreting this section can be found by analogy to a similar exemption provision of the Motor Carrier Act.

Pre-emption has been found under 49 U.S.C. § 303(b)(6), which exempts motor vehicles used to carry nonmanufactured agricultural commodities. *State Corporation Comm. v. Bartlett*, 338 F. 2d 495 (10th Cir. 1964). *Bartlett* involved the transportation of grain within the State of Kansas to a processing point from which it was ultimately shipped in interstate commerce. After finding that the initial shipment was in the flow of commerce and thus considered to be in interstate commerce, the court held that there was pre-emption. Defendants suggest that the case is distinguishable because it dealt with an agricultural exemption with a peculiar legislative history which distinguishes it from the commercial zone exemption. This court disagrees. Although there is mention of the legislative history of the agricultural exemption, the holding appears to be grounded primarily upon the distinction between rate regulation and other types of regulation practiced by the states. The opinion indicates that the states' interest in highway safety, police power, health and safety and prevention of fraud are much greater than in the area of rate regulation, which it viewed as having "commercial aims". *State Corporations Comm. v. Bartlett, supra* at 498-499. Certainly, the instant case has overtones of commercial regulation, however sincere and highly motivated the defendants may be. It is clear that forcing plaintiff motor carriers to charge higher rates to plaintiff non-profit shippers results in some competitive advantage to local manufacturers and producers of goods by increasing

the costs to distant sellers in the marketing of their goods in California commercial zones.

Defendants maintain that California has a legitimate interest in maintaining minimum rates and regulation to see that sufficient marginal profit is made to allow the motor carriers to maintain their equipment in a safe manner and to protect the economic welfare of California motor carriers by not allowing them to engage in cutthroat competition with each other for the business of the nonprofit shippers' associations.

The United States Supreme Court recently considered similar arguments with respect to terminal zone transfer service which is regulated by the Interstate Commerce Act, but exempted from regulation under the Motor Carrier Act by 49 U.S.C. § 302(c)(2). The Court held that the City of Chicago was not free to impose a comprehensive licensing scheme under the guise of general safety regulations. *Railroad Transfer Service Inc. v. Chicago,* ..... U.S. ....., 35 U.S.L. Week 4306 (decided March 27, 1967). In the instant case no one has disputed the jurisdiction of defendants to directly impose reasonable safety regulations, but they are not free to accomplish this alleged goal indirectly through such a method as rate regulation.

Defendants' contention that the regulation can be justified as a protection against destructive competition is without merit. Defendants introduced no evidence to establish that harm of this nature had occurred, but assuming arguendo that such a showing had been made, the interest the State asserts is one of economic protection for common carriers and does not come within the health, safety and welfare, or police power interests which have been recognized to have validity.

Further support for the finding that there is pre-emption is found in the Freight Forwarder Act. As previously

discussed, the functions performed by freight forwarders and nonprofit shippers' associations are nearly identical, with the exception of the profit motive and service to the general public in the case of the freight forwarder as compared with the nonprofit shippers' association. Were it not for this distinction recognized in 49 U.S.C. § 1002(c)(1), nonprofit shippers' associations would be treated as freight forwarders. Motor carriers performing delivery services for freight forwarders within commercial zones in the State of California are not regulated by defendants because they are precluded from such regulation by virtue of the provisions of 49 U.S.C. § 302(c)(1), which indicates that motor carriers are exempted from regulation under the act when performing services for freight forwarders within "terminal areas" [which terminal areas are defined by the same limits as the commercial zones of 49 U.S.C. § 303(b)(8), see *Sea-Land Service, Inc. v. United States,* 222 F. Supp. 558 (D.C. Del. 1963)]. Thus, the entire operation is subject to regulation under the Freight Forwarder Act. Regulation of these services, which are the same as those provided for nonprofit shippers' associations, by the states is thus prohibited by direct statutory pre-emption. Since nonprofit shippers' associations are exempted from treatment as freight forwarders, 49 U.S.C. § 1002(c)(1), the status of regulation within the commercial zones becomes a matter of significance if there is no general pre-emption of commercial zones by virtue of the Motor Carrier Act.

Assuming that the Motor Carrier Act alone has not pre-empted the field of commercial zone transportation, it appears that, nonetheless, the provisions of the Freight Forwarder Act relating to nonprofit shippers' associations and motor carriers providing services for them clearly

establish pre-emption.[5] The language of 49 U.S.C. § 1002 (c)(1) indicates that nonprofit shippers' associations enjoy a preferred status within the scheme of national transportation. The exemption is made applicable to ". . . the operations of a shipper, or a group or association of shippers, in consolidating *or distributing* freight for themselves or for the members thereof, on a nonprofit basis, *for the purpose of securing the benefits of carload, truckload, or other volume rates. . . .*" (emphasis added). It is clear that the statute recognizes a benefit and endorses that benefit by exemption and that part of the benefit is in the distribution process. The activities of the motor carriers in delivery of the goods from break-bulk points to final destination is certainly an integral part of the distribution process, cf. *Lifschultz v. United States,* 144 F. Supp. 606 (S.D. N.Y. 1956), and it is clear that benefits are obtained by consolidated direct line distribution methods beyond break-bulk points.

Another section of the Freight Forwarder Act offers still further support for pre-emption. This is 49 U.S.C. § 1008, the section under which the plaintiff carriers have filed tariffs with the Interstate Commerce Commission. The application of this section is permissive, rather than mandatory, but it allows the establishment of assembly and distribution rates by common carriers serving ". . . freight forwarders and *others who employ or utilize the instrumentalities or services of such common carriers under like conditions. . . .*" Although the language does not refer specifically to nonprofit shippers' associations, they certainly come within the category of others who operate under

5. The court expresses no opinion on the question of whether the Motor Carrier Act alone pre-empts the field in view of the more persuasive reasoning for pre-emption found by reading Parts II and IV of the Act together.

like conditions. Consequently, if it is permissible for motor carriers to file tariffs with the I.C.C. when serving non-profit shippers' associations, it seems most likely that this permission would include tariffs for deliveries wholely within commercial zones in the same manner it does for freight forwarders, where the services performed by the motor carriers is practically identical.

Although pre-emption will not be lightly inferred unless the nature of the subject permits no other conclusion or Congress has unmistakenly so-ordained, *Florida Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963), the court finds that the comprehensive regulatory scheme of the Interstate Commerce Act, including both the Motor Carrier Act, Cf. *State Corporations Comm. v. Bartlett, supra,* and the Freight Forwarder Act and the nature of the subject matter sought to be regulated require a finding that the field has been pre-empted by federal regulation.

This finding is made not only in the three-judge capacity of the court, but also the original district judge finds individually that he would reach the same conclusion with respect to pre-emption. The individual finding is made to satisfy the jurisdictional requirement set forth in *Swift & Co. v. Wickham,* 382 U.S. 111 (1965). The *Swift* case requires a substantial question of constitutional law to support three judge jurisdiction and holds that a finding solely on the grounds that the Supremacy Clause of the United States Constitution, Art. VI, has pre-empted the field is not such a question.

The court, sitting in its three-judge capacity, finds that the constitutional question presented under the Commerce Clause, U.S. Const. Art. I, Sect. 8, is not insubstantial and proceeds to consider the issue.

THE COMMERCE CLAUSE QUESTION

The court is of the opinion and finds that even in the absence of pre-emption, the scheme of rate regulation defendants seek to impose violates the Commerce Clause of the United States Constitution. U.S. Const. Art. I, Sect. 8.

In making this determination, the court is faced with essentially a balancing process to determine the relative importance of the competing interests. An analysis of the evidence shows that the imposition of California minimum rate tariffs will result in substantially higher costs to out-of-state shippers who ship through nonprofit shippers' associations and will result in a decrease in the flow of traffic into California. Defendants maintain that the rates are nonetheless justified, since the matter is one of primary local concern, and the State has a legitimate interest in maintaining a fully regulated system which would be disrupted by lack of direct regulation.

The testimony of Mr. A. E. Norrbom clearly establishes and defendants do not dispute that the distribution charges under the California minimum rate tariffs would be higher than those under the contract rates or assembly and distribution tariffs plaintiff motor carriers presently operate under. Defendants do no accept the precise figures and methods used by Mr. Norrbom in arriving at his comparisons, but they have made no specific studies themselves which show any substantial difference.[6] (See transcript, pp. 536-541). Plaintiffs have shown that defendants' tariffs would result in increases in delivery costs within the commercial zones of from approximately 24 per cent to 95

6. Considerable testimony was elicited at trial on the question of whether the California rate structure was designed to be applied to motor carriers performing services for nonprofit shippers' associations; in view of the disposition made, the court finds no need to reach that question.

per cent, with the average increase around 80 per cent. (Deposition of Norrbom, pp. 17-18; Plaintiffs' Exh. 6-9). The testimony of Mr. Saunders further establishes that these increases in local delivery costs would increase the total delivery costs of the nonprofit shippers' associations in the neighborhood of 12 per cent to 15 per cent. (Transcript, pp. 26-27). Accordingly, there can be no doubt that the rate regulation by the State of California would result in a substantial economic burden on commerce. The law is clear that a state may not, in the absence of compelling reasons, impose a direct economic burden on commerce through the establishment of rates. *Ohio Railroad Comm. v. Worthington,* 225 U.S. 101, 108 (1912); *Wilmington Transportation Co. v. Railroad Comm. of Calif.,* 236 U.S. 151 (1914). It has also long been established that "the State cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by the Federal authority." *The Shreveport Rate Case, Houston & Texas Railway Co. v. United States,* 234 U.S. 342, 354 (1914). While there has been no federal rate set in this instance, there is a clear federal policy favoring nonprofit shippers' association, expressed in 49 U.S.C. § 1002(c)(1) even by comparison with freight forwarders, and freight forwarders are allowed to file assemby and distribution tariffs and negotiate rates in a manner like that in which plaintiffs desire to operate. 49 U.S.C. §§ 302(c)(2), 1008 and 1009. It is the view of the court that the effect is the same as that prohibited in the *Shreveport Rate Case* and is an unconstitutional burden on commerce.

This finding is further supported by evidence of violations of the "long and short haul principle". The testimony of Mr. Norrbom indicates and the defendants' expert, Mr.

Lane, agrees that instances would occur under the California tariffs where a motor carrier delivering goods from within a commercial zone would be forced to charge higher rates for the short haul deliveries within the commercial zone than for longer haul deliveries along the same route but outside of the commercial zone. (Deposition of Norrbom, pp. 27-30, Transcript, p. 630.) In the latter situation involving longer haul deliveries along the same route but outside the commercial zone, it is clear that the state is prohibited from regulation by the Motor Carrier Act.[7] This amounts to a direct and discriminatory burden on interstate commerce.

A further basis for finding an unconstitutional burden on commerce is found in the evidence introduced at trial that defendants' rate structure would result in an interference with the free flow of commerce.

Mr. Saunders testified that the increase in costs would result in a drying up of some of the traffic and an impairment of the ability of some out-of-state producers to compete in the California market. (Transcript, pp. 27-30, 33). He states in testimony that was nowhere effectively rebutted that "the California regulation would impose a trade barrier by artificially impairing the ability of producers in other states to compete with those in California." (Transcript, p. 30). The commerce clause clearly protects inter-

7. Section 303(b)(8) of Title 49 of the United States Code only exempts traffic within commercial zones, thus traffic travelling outside of commercial zones, though originating within commercial zones, is under the jurisdiction of the Interstate Commerce Commission. Carriers are permitted to file tariffs for this traffic under 49 U.S.C. § 1008. The evidence adduced at trial indicates that some motor carriers do not now file tariffs with the Interstate Commerce Commission, but rely upon the nonprofit shippers' association exemption, 49 U.S.C. § 1002(c)(1), to allow completely free contracting for rates. (See also 49 U.S.C. § 1009). The propriety of this practice is in no way before this court.

state commerce from actions by any state which result in an unreasonable disruption of the free flow of commerce. *Buck v. Kuykendall*, 267 U.S. 307 (1925). Defendants rely upon *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938), for the proposition that even a significant interference with the flow of commerce can be sustained. That case is distinguishable in that *Barnwell* dealt with a state interest in the safety and maintenance of its highways. A safety interest is high order of interest on the scale of state interests, but there is and can be no such interest directly allied to the fixing of minimum rates in this case. It is clear that any indirect safety benefit which may accrue to the state through the imposition of higher tariffs and consequently higher profits will not suffice to support the measure as a safety measure. Cf. *Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922).

Defendants' contention that there is a significant state interest in uniformity of regulation within the State of California is first without factual support, and second, not the type of interest which is recognized under the commerce clause cases. Defendants' own witness, Mr. Kaspar, testified that the traffic of motor carriers delivering goods for nonprofit shippers' associations within commercial zones amounted to less than ¾ of 1 per cent of the overall freight traffic in California. (Transcript, p. 696). The cases cited by defendants to support state regulation despite some burden have all dealt with a different order of state interest. See *Milk Control Bd. of Pa. v. Eisenberg Farms*, 306 U.S. 346 (1939), (incidental burden, strong state interest in health); *Nebbia v. New York*, 291 U.S. 502 (1938), (price control attacked on due process and equal protection grounds). Defendants' reliance on *Wilmington Transportation Co. v. Railroad Comm'n of California*, 236 U.S. 151

(1915), requires some special comment. *Wilmington* involved state regulation of the rates charged by ferries serving passengers in transit between San Pedro on the California mainland and Avalon on Santa Catalina Island, both of which places were within Los Angeles County. The court upheld state regulation in this area despite the fact the voyage involved traversing the high seas. Since both ports were within the same state and county, there is an apparent analogy to transportation within a commercial zone; however, the analogy is not controlling. In *Wilmington*, the Court carefully pointed out that they were not dealing with property involved in the course of continuous transit between states. *Wilmington Transportation Co. v. Railroad Comm'n of California, supra* at 156. The case is thus distinguishable as one of purely local nature that only incidentally happens to pass in interstate commerce in a very technical sense. Similarly, *Port Richmond v. Bergen Point Ferry*, 234 U.S. 317 (1914), involved primarily local transportation and is distinguishable.

The court thus concludes that imposition of the minimum rates established by the Public Utilities Commission of the State of California amounts to an unreasonable and unconstitutional burden on interstate commerce.

In view of the findings on pre-emption and the burden on interstate commerce, it is unnecessary to reach the additional contentions raised by plaintiffs that defendants' rates would violate the equal protection and due process clauses. U.S. Const. Amend. XIV, Sect. 1., and likewise, to reach the question posed by plaintiff motor carriers regarding the filing of tariffs with the Interstate Commerce Commission.

Accordingly, plaintiffs' prayer for declaratory relief and a permanent injunction is granted. IT IS ORDERED that defendants be permanently enjoined from enforcing minimum rates published under the authority of the California Public Utilities Code upon plaintiffs.

This opinion and order constitute the court's findings of fact and conclusions of law in accordance with F.R. Civ. P. 52(a).

Dated: May 23, 1967

/s/ O. D. HAMLIN
United States Circuit Judge

/s/ LLOYD H. BURKE
United States District Judge

/s/ ALFONZO J. ZIRPOLI
United States District Judge

District Court Judgment and Order

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JUDGMENT AND ORDER

These actions were brought by two classes of plaintiffs, (1) nonprofit cooperative shippers' associations, and (2) motor carriers who contract with such shippers' associations to deliver their goods from break-bulk point to final destination, both points being within the State of California.

Plaintiff shippers' associations provide shipping services to members at no profit to the association and at a saving over other means available to the shippers by pooling members' shipments into carload or trailer load lots for shipment by railroad over long haul interstate routes.

Defendant seeks to require the carriers to assess charges in accordance with its minimum rate tariffs published under the authority of the California Public Utilities Code. The tariffs contain charges for delivery services performed wholly within commercial zones, which services are exempt from economic regulation by the Interstate Commerce Commission under the provisions of 49 U.S.C. 303(b)(8).

The parties have stipulated that the entire movement involved here is in interstate commerce, thus the only issue before the court is the lawfulness of the defendants' attempts to impose a schedule of minimum rates to be charged by the motor carriers to the nonprofit shippers' associations for deliveries made within the commercial zones.

Plaintiffs having filed in this Court a complaint for a declaratory judgment under The Declaratory Judgment Act, 28 U.S.C. 2201-02, and for a permanent injunction under 28 U.S.C. 2281, and in support thereof having produced testimony and authorities, this Court finds that plaintiffs, and each of them, are entitled to declaratory relief and a permanent injunction on the grounds that the comprehensive regulatory scheme of the Interstate Commerce Act, including both the Motor Carriers Act (Part II of the I.C.A.) and the Freight Forwarder Act (Part IV of the I.C.A.), and the nature of the subject matter sought to be regulated require a finding that the field has been pre-empted by federal regulation; that economic regulation of interstate transportation wholly within commercial zones in California, exempt from regulation as above described, for a group or association of shippers constitutes an unreasonable and unconstitutional burden on interstate commerce.

It Is Therefore Declared:

(a) That minimum rates, and rules and regulations pertinent thereto, prescribed and established by the Public

Utilities Commission of the State of California are inapplicable to the transportation in interstate commerce of property wholly within a municipality or between contiguous municipalities or within a zone adjacent to a [and] commercially a part of any such municipality or municipalities (49 U.S.C. 303(b)(8)) for a group or association of shippers exempted from the provisions of the Freight Forwarder Act by 49 U.S.C. 1002(c)(1), and

(b) That the Public Utilities Commission of the State of California and its Commissioners lack jurisdiction to regulate the rates and charges of motor carriers for interstate transportation of property within the State of California and wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities for a group or association of shippers, and

It Is Therefore Ordered that defendants, their agents, servants, employees and attorneys, and all persons in active concert and participation with defendants, be permanently restrained and enjoined:

(a) From publishing tariffs and otherwise establishing minimum rates and rules and regulations therefor, under the authority of the law of the State of California with respect to motor transportation services in interstate commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities for a group or association of shippers exempted from the provisions of the Freight Forwarder Act by 49 U.S.C. 1002(c)(1);

(b) From interfering with the businesses of a group or association of shippers exempted from the provisions of the Freight Forwarder Act by 49 U.S.C. 1002(c)(1) in consoli-

dating or distributing freight in interstate commerce, and the businesses of motor carriers in interstate commerce performing transportation of property services wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities for a group or association of shippers exempted from the provisions of the Freight Forwarder Act by 49 U.S.C. 1002(c)(1) by asserting the applicability of, and enforcing minimum rates, and rules and regulations therefor, under the authority of the law of the State of California; and

(c) From asserting, attempting to assert, applying, attempting to apply, enforcing, or attempting to enforce, any penalty provided by the law of the State of California for the assessing and collecting of rates and charges which are different than the minimum rates and charges prescribed by the California Public Utilities Commission for the transportation in interstate commerce of property wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities for a group or association of shippers exempted from the provisions of the Freight Forwarder Act by 49 U.S.C. 1002(c)(1).

Dated September 7, 1967

/s/ OLIVER D. HAMLIN
United States Circuit Judge

/s/ LLOYD H. BURKE
United States District Judge

/s/ ALFONSO J. ZIRPOLI
United States District Judge

Appendix B

California Statutes

Calif. Public Utilities Code § 494 (Stats. 1951, c. 764, p. 2042.)

No common carrier shall charge, demand, collect, or receive a different compensation for the transportation of persons or property, or for any service in connection therewith, than the applicable rates, fares, and charges specified in its schedules filed and in effect at the time, nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, except upon order of the commission as provided in this part, nor extend to any corporation or person any privilege or facility in the transportation of passengers or property except such as are regularly and uniformly extended to all corporations and persons.

Calif. Public Utilities Code § 726 (Stats. 1951, c. 764, p. 2049.)

It is the policy of the State in rate making to be pursued by the commission to establish such rates as will promote the freedom of movement by carriers of agricultural commodities, including livestock, at the lowest lawful rates compatible with the maintenance of adequate transportation service.

In any rate proceeding where more than one type or class of carrier, as defined in this part or in the Highway Carriers' Act, is involved, the commission shall consider all such types or classes of carriers, and, pursuant to the provisions of this part or the Highway Carriers' Act, fix as minimum rates applicable to all such types or classes of carriers the lowest of the lawful rates so determined for

any such type or class of carrier. This provision does not prevent the commission from granting to carriers by water such differentials in rates as are permitted under other provisions of law.

Calif. Public Utilities Code § 730 (Stats. 1951, c. 764, p. 2049.)

The commission shall, upon a hearing, determine the kind and character of facilities and the extent of the operation thereof, necessary reasonably and adequately to meet public requirements for service furnished by common carriers between any two or more points, and shall fix and determine the just, reasonable, and sufficient rates for such service. Whenever two or more common carriers are furnishing service in competition with each other, the commission may, after hearing, when necessary for the preservation of adequate service and when public interest demands, prescribe uniform rates, classifications, rules, and practices to be charged, collected, and observed by all such common carriers.

Calif. Public Utilities Code § 731 (Stats. 1951, c. 764, p. 2050.)

Whenever the commission, after a hearing, finds that any rate or toll for the transportation of property is lower than a reasonable or sufficient rate and that the rate is not justified by actual competitive transportation rates of competing carriers, or the cost of other means of transportation, the commission shall prescribe such rates as will provide an equality of transportation rates for the transportation of property between all such competing agencies of transportation. When in the judgment of the commission a differential is necessary to preserve equality of competitive

transportation conditions, a reasonable differential between rates of common carriers by rail and water for the transportation of property may be maintained by such carriers, and the commission may by order require the establishment of such rates.

Calif. Public Utilities Code § 3502 (Stats. 1951, c. 764, p. 2112, as amended Stats. 1963, c. 2147, p. 4477, § 14.)

The use of the public highways for the transportation of property for compensation is a business affected with a public interest. It is the purpose of this chapter to preserve for the public the full benefit and use of public highways consistent with the needs of commerce without unnecessary congestion or wear and tear upon such highways; to secure to the people just and reasonable rates for transportation by carriers operating upon such highways; and to secure full and unrestricted flow of traffic by motor carriers over such highways which will adequately meet reasonable public demands by providing for the regulation of rates of all transportation agencies so that adequate and dependable service by all necessary transportation agencies shall be maintained and the full use of the highways preserved to the public. It is the further purpose of this chapter to eliminate, so far as reasonably possible, the excessive use of highways that has resulted from excessive crosshauling of portland and similar cements which has heretofore pertained, when they are hauled in a motor vehicle or motor vehicles loaded substantially to capacity with such commodity or commodities, since these commodities move in great volume in vehicles that are loaded substantially to the permissible gross weight limits provided by the Vehicle Code.

Calif. Public Utilities Code § 3506 (Stats. 1951, c. 764, p. 2113.)

This chapter shall not be construed as a regulation of commerce with foreign nations or among the several states, except insofar as such regulation is permitted under the provisions of the Constitution and the acts of the Congress of the United States.

Calif. Public Utilities Code § 3662 (Stats. 1951, c. 764, p. 2118.)

The commission shall, upon complaint or upon its own initiative without complaint, establish or approve just, reasonable, and non-discriminatory maximum or minimum or maximum and minimum rates to be charged by any highway permit carrier for the transportation of property and for accessorial service performed by it.

In establishing or approving such rates the commission shall give due consideration to the cost of all of the transportation services performed, including length of haul, any additional transportation service performed, or to be performed, to, from, or beyond the regularly established termini of common carriers or of any accessorial service, the value of the commodity transported, and the value of the facility reasonably necessary to perform the transportation service.

Calif. Public Utilities Code § 3666 (Stats. 1951, c. 764, p. 2118, as amended Stats. 1959, c. 1566, p. 3899, § 2.)

If any highway carrier other than a highway common carrier desires to perform any transportation or accessorial service at a lesser rate than the minimum established rates, the commission shall, upon finding that the proposed rate is reasonable, authorize the lesser rate.

Calif. Public Utilities Code § 3902 (Stats. 1951, c. 764, p. 2125.)

The use of the public highways for the transportation of property for compensation is a business affected with a public interest. It is the purpose of this chapter to preserve for the public the full benefit and use of public highways consistent with the needs of commerce without unnecessary congestion or wear and tear upon such highways; to secure to the people just and reasonable rates for transportation by carriers operating upon such highways; and to secure full and unrestricted flow of traffic by motor carriers over such highways which will adequately meet reasonable public demands by providing for the regulation of rates of all transportation agencies so that adequate and dependable service by all necessary transportation agencies shall be maintained and the full use of the highways preserved to the public.

Calif. Public Utilities Code § 3906 (Stats. 1951, c. 764, p. 2126.)

This chapter shall not be construed as a regulation of commerce with foreign nations or among the several states, except insofar as such regulation is permitted under the provisions of the Constitution and the acts of the Congress of the United States.

Calif. Public Utilities Code § 4011 (Stats. 1951, c. 764, p. 2129.)

The commission shall, upon complaint or upon its own initiative without complaint, establish or approve just, reasonable, and non-discriminatory maximum or minimum or maximum and minimum rates to be charged by any carrier subject to this chapter.

Calif. Public Utilities Code § 4015 (Stats. 1951, c. 764, p. 2129.)

If any carrier desires to perform any transportation or accessorial service at a lesser rate than the established minimum rates, the commission shall, upon finding that the proposed rate is reasonable and consistent with the public interest, authorize the lesser rate.

Appendix C

Federal Statutes

49 U.S.C. 302(c)(2)(1) (49 Stat. 498).

Notwithstanding any provision of this section or of section 303 of this title, the provisions of this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employers and safety of operation and equipment, shall not apply....

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to chapter 1 of this title, an express company subject to chapter 1 of this title, a motor carrier subject to this chapter, a water-carrier subject to chapter 12 of this title, or a freight forwarder subject to chapter 13 of this title, in the performance within terminal areas of transfer, collection or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transporation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

49 U.S.C. 303(b)(6)&(8) (49 Stat. 544).

(b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include ... (6) motor vehicles used in carrying property consisting

of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation: *Provided,* That the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" as used herein shall include property shown as "Exempt" in the "Commodity List" incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as "Not exempt": *Provided further, however,* That notwithstanding the preceding proviso the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" shall not be deemed to include frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted), and shall be deemed to include cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not including fish and shell fish which have been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products); . . . nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transpor-

tation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, . . .

49 U.S.C. 1002(c)(1) (56 Stat. 284).

(c) The provisions of this chapter shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits or carload, truckload, or other volume rates, . . .

49 U.S.C. 1008 (56 Stat. 290).

Nothing in this Act shall be construed to make it unlawful for common carriers subject to chapters 1, 8 or 12 of this title to establish and maintain assembling rates or charges and/or distribution rates or charges, and classifications, rules, and regulations with respect thereto, applicable to freight forwarders and others who employ or utilize the instrumentalities or services of such common carriers under like conditions, which differ from other rates or charges, classifications, rules, or regulations which contemporaneously apply with respect to the employment or utilization of the same instrumentalities or services, if such difference is justified by a difference in the respective conditions under which such instrumentalities or services are employed or utilized. For the purposes of this section (1) the term "assembling rates or charges" means rates or charges for

the transportation of less-than-carload or less-than-truckload shipments into a point for further movement beyond as part of a carload or truckload shipment, and (2) the term "distribution rates or charges" means rates or charges for the transportation of less-than-carload or less-than-truckload shipments moving from a point into which such shipments have moved as a part of a carload or truckload shipment. The provisions of this section shall not be construed to authorize the establishment of assembling rates or charges or distribution rates or charges covering the line haul transportation between the principal concentration point and the principal break-bulk point.